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No. 89-5934

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

WILLIAM THOMAS CARTWRIGHT,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

November, 1989

QUESTIONS PRESENTED

1. Whether application of the procedural rule enacted in 1985 permitting remand of Petitioner's capital case for resentencing in the event of punishment-stage error to a homicide committed in 1982 violates the **Ex Post Facto Clause** of the Constitution.

2. Whether the change in position of the Oklahoma Court of Criminal Appeals regarding such alleged violation of ex post facto principles affects Petitioner's substantive rights by making his crime greater or inflicting greater punishment than when the crime was committed.

3. Whether Petitioner can again be sentenced to death or is entitled only to receive a sentence of life imprisonment pursuant to the determinations made in answering the above-stated questions.

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The Respondent, State of Oklahoma, by and through Robert H. Henry, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the Court of Criminal Appeals of the State of Oklahoma.

OPINIONS BELOW

The Opinion of the Oklahoma Court of Criminal Appeals below remanding Petitioner's cause for resentencing of Petitioner is reported as Cartwright v. State, 778 P.2d 479 (Okla. Crim. App. 1989). That action involved Petitioner's filing a state habeas corpus action seeking to preclude his resentencing as violative of ex post facto principles.

The need to address Petitioner's sentence arose from this Court's affirmance of a grant of federal habeas corpus relief in Maynard v. Cartwright, 486 U.S. 356 (1988), where this Court upheld the decision of the United States Court of Appeals for the Tenth Circuit that Petitioner's death sentence must be vacated because jury discretion was not channeled constitutionally in assessing whether the murder of Hugh Riddle was "especially heinous, atrocious or cruel". The Tenth Circuit opinion is reported as Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987) (en banc). A previous decision by a three-judge panel of that court affirming the denial of federal habeas corpus relief is reported as Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986).

The opinion of the Oklahoma Court of Criminal Appeals on direct appeal is reported at 695 P.2d 548 (Okla. Crim. App. 1985), **cert. denied**, 473 U.S. 911 (1985). The affirmance of Petitioner's appeal from the denial of post-conviction relief is reported at 708 P.2d 592 (Okla. Crim. App. 1985), **cert. denied**, 474 U.S. 1073 (1986).

JURISDICTION

The Opinion of the Oklahoma Court of Criminal Appeals was entered on July 31, 1989. This Court's jurisdiction is purportedly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 10, of the United States Constitution provides, in part:

> No State shall ... pass any ...ex post facto Law ...

The Eighth Amendment to the United States Constitution provides, in relevant part:

> Excessive bail shall not be required, ... nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in part:

> ... nor shall any State deprive any person of life, liberty, or property, without due process of law.

Okla.Stat.tit. 21 § 701.13 (1981) provided in relevant part:

> E. ...In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:
>
> 1. Affirm the sentence of death; or
>
> 2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

Okla.Stat.tit. 21 § 701.13 (West Supp.1985) provides as follows, in pertinent part:

> E. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

> 1. Affirm the sentence of death; or
>
> 2. Set the sentence aside and remand the case for resentencing by the trial court.

Okla.Stat.tit. 21, § 1066 (1981) provides, in pertinent part:

> The appellate court may reverse, affirm or modify the judgment appealed from, and may, if necessary or proper, order a new trial.

STATEMENT OF THE CASE

The Petitioner, William Thomas Cartwright, was convicted in the District Court, Muskogee County, State of Oklahoma, of shooting with intent to kill and murder in the first degree. The Petitioner received sentences of seventy-five (75) years and death respectively.

Upon rehearing en banc of the Petitioner's appeal from denial of federal habeas corpus relief, the United States Court of Appeals for the Tenth Circuit vacated Petitioner's death sentence. Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1988) (en banc). This Court affirmed that decision in Maynard v. Cartwright, 486 U.S. 356 (1988).

Petitioner filed a petition for a writ of habeas corpus in the Oklahoma Court of Criminal Appeals, seeking the modification of his sentence to one of life imprisonment. That Court reversed its position that the 1985 resentencing amendment could not be retroactively applied under ex post facto principles and remanded Petitioner's cause to the state district court for resentencing. Cartwright v. State, 778 P.2d 479 (Okla. Crim. App. 1989).

Petitioner, in his Petition at 5, makes reference to an acknowledgement by the State that modification to a life sentence was the appropriate remedy. Importantly, the State simply acknowledged the status of the law as then interpreted by the Oklahoma Court of Criminal Appeals, not the correctness of that interpretation. As addressed, infra, Respondent contends that application of the resentencing provision of § 701.13(E)(2) in the present case does not violate the **Ex Post Facto Clause** of the United States Constitution.

A petition for rehearing on the state habeas corpus proceeding was denied by the Oklahoma Court of Criminal Appeals on September 5, 1989.

STATEMENT OF THE FACTS

A discussion of the facts involved in the instant action is found in Cartwright v. State, 695 P.2d 549, 550-51 (Okla. Crim. App. 1985). This Court also discussed the facts in Maynard v. Cartwright, 108 S.Ct. 1853, 1856 (1988). Because of this Court's familiarity with those facts and because a review of the facts is not central to determination of the issue presented herein, Respondent declines to engage in further discussion of the facts of Petitioner's crimes against Hugh and Charma Riddle.

REASONS WHY THE WRIT SHOULD BE DENIED

PROPOSITION

THE PETITIONER MAY BE RESENTENCED WITHOUT VIOLATING THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION

In Maynard v. Cartwright, 108 S.Ct. at 1860, this Court stated that its decision affirming the vacation of Petitioner's death sentence due to the overbroad interpretation of the statutory aggravating circumstance that the murder of Hugh Riddle was especially heinous, atrocious or cruel was

> "without prejudice to further proceedings in the state courts for redetermination of the appropriate sentence."

Petitioner sought to have the sentence of life imprisonment declared the appropriate sentence through the filing of the state habeas corpus petition wherein he asserted that the only recourse was to modify his sentence to life imprisonment.

The Oklahoma Court of Criminal Appeals disagreed, reversing its previous position that a life sentence was the only possible punishment available. Cartwright v. State, 778 P.2d at 482. In Dutton v. Dixon, 757 P.2d 376, 381 (Okla. Crim. App. 1988), a majority of the Oklahoma Court of Criminal Appeals held that Okla.Stat.tit. 21 § 701.13(E)(2) (West Supp. 1985) could not be

applied retroactively under ex post facto principles. In Cartwright v. State, 778 P.2d at 482, the court engaged in a discussion of such principles, concluding that application of the resentencing statute in Petitioner's case does not violate such principles, overruling Dutton v. Dixon. Cartwright v. State, 778 P.2d at 483.

The Oklahoma Court of Criminal Appeals relied upon the opinion of the United States Court of Appeals for the Tenth Circuit in Coleman v. Saffle, 869 F.2d 1377, 1385 (10th Cir. 1989), in reaching this conclusion. Coleman also involved the appeal from denial of federal habeas relief of a capital defendant who raised an ex post facto claim. That claim concerned the change in interpretation by the Oklahoma Court of Criminal Appeals concerning its power to reweigh aggravating and mitigating circumstances in the event that an aggravating circumstance was declared infirm upon appeal. Although that claim addressed judicial interpretation rather than retroactive interpretation of a statutory enactment, the Tenth Circuit applied ex post facto principles in denying Coleman's claim.

As discussed by the court in Coleman v. Saffle, id.:

> [T]he critical test, as stated in recent Supreme Court cases, is whether, as applied, the change impairs "substantial personal rights," or merely changes "modes of procedure which do not affect matters of substance." Dobbert v. Florida, 432 U.S. 282, 293, 97 S.Ct. 2290, 229 [sic], 53 L.Ed.2d 344 (1977) (quoting Beazell v. Ohio, 269 U.S. 167, 171, 46 S.Ct. 68, 69, 70 L.Ed. 216 (1925)); see also Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987); United States v. Affleck, 765 F.2d 944, 948 (10th Cir.1985)(en banc)(no ex post facto violation if new law is merely procedural and does not increase punishment for, or change the elements of, an offense, or alter facts necessary to establish guilt).

Applying the analysis employed by the Tenth Circuit in the Coleman case, the Oklahoma Court of Criminal Appeals held that Petitioner "can be resentenced without violating due process or the ex post facto prohibition of either the Oklahoma or Federal Constitutions." Cartwright v. State, 778 P.2d at 482. Important to the court's determination was the fact that resentencing would

subject Petitioner to the same possible punishments as existed at the time of trial: death or life imprisonment.

Moreover, the court concluded that Petitioner did not have a "right" to a modified sentence of life imprisonment (the previous erroneous interpretation of ex post facto principles employed by the Oklahoma Court of Criminal Appeals in Dutton v. Dixon, 75 P.2d 376, 381 (Okla. Crim. App. 1988) and its predecessors). As stated by the court:

> Defendants may have had expectations that their sentences would automatically be modified to life imprisonment, but the ex post facto clause does not prevent the State from depriving a criminal defendant of an expectation as to a procedure that has not yet accrued to his benefit. See State v. Norton, 675 P.2d 577 (Utah 1983).

Cartwright v. State, 778 P.2d at 482.

It would be illogical indeed to permit a retrial of both issues of guilt and punishment where an appellate court has determined that error occurred during the guilt stage of a capital case, yet not permit a retrial of the sentencing stage of trial where error occurred only during that latter stage of trial. Respondent notes that its position consistently has been that it is permissible for the Oklahoma Court of Criminal Appeals to independently reweigh aggravating and mitigating circumstances (the Coleman issue) and to resentence in the event of punishment-stage error (the issue presently before this Court). Oklahoma law long has provided the Oklahoma Court of Criminal Appeals with the authority to order a new trial as a mechanism to correct errors. Okla.Stat.tit. 22, § 1066 (1981). Here correction of error is accommodated by a new trial regarding punishment. The State simply acceded to stare decisis in the brief on rehearing when it acknowledged that Oklahoma law did not allow for resentencing in Petitioner's case.

Respondent submits that the rule announced by the Oklahoma Court of Criminal Appeals in Petitioner's attempt to gain state habeas corpus relief is the correct interpretation of law addressing ex post facto principles. This Court has addressed

those principles in the context of a state criminal capital case. In Dobbert v. Florida, 432 U.S. 282, 292 (1977), this Court concluded that statutory changes in the role of judge and jury in death penalty cases rendering the jury's verdict on the imposition of sentence advisory did not violate the Ex Post Facto Clause of the Constitution when applied to a case in which the changes in the law occurred after the commission of the crime but prior to the trial of the matter. The changes were viewed as procedural in nature, permitting their application to a case which commenced prior to their effective date.

Procedural changes do not constitute ex post facto laws even though they may work to the disadvantage of a defendant. Id., at 293. In the present case, the Petitioner may be disadvantaged by the 1985 amendment providing for resentencing through a perceived claim of entitlement to modification of his sentence to life imprisonment where punishment-stage error was present. However, the provision for resentencing does not increase the potential punishment to be received: as charged pursuant to the filing of a Bill of Particulars, Petitioner was subject to a sentence of death or life imprisonment. A resentencing procedure subjects him to those same alternatives. Cf. Miller v. Florida, 482 U.S. 423, 436 (1987) (state sentencing guideline statute enacted after the defendant's crime which increased the presumptive sentence range constituted an ex post facto law as applied to that defendant).

The affirmance by this Court of the Tenth Circuit's decision that Petitioner's sentence of death was premised upon an invalid statutory aggravating circumstance does not operate as an acquittal regarding a verdict of death upon consideration of any aggravating circumstance which constitutionally does apply. The 1985 resentencing amendment operates as a procedure to ensure that the appropriate sentence is imposed in a capital case. It does not create a new circumstance in which death may be the appropriate sentence as was the case in Kring v. Missouri, 107 U.S. 221, 228 (1883). The Tenth Circuit distinguished application of Kring in United States v. Affleck, 765 F.2d 944, 950 (10th Cir. 1985), when

it concluded that new rules governing bail pending appeal did not violate ex post facto principles. Kring is similarly distinguishable in the instant case.

Neither is the instant situation akin to that present in Weaver v. Graham, 450 U.S. 24 (1981), where this Court held that a Florida "gain time" sentencing credit statute was an ex post facto law as applied to a criminal defendant whose crime occurred prior to the statute's enactment. In that case this Court reiterated its recognition

> that a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed (cites omitted)

450 U.S. at 32. Petitioner Weaver had pleaded guilty to second degree murder, no doubt evaluating his actual incarceration time in making his decision to so plead.

In the present case Petitioner entered pleas of not guilty to the crime and Bill of Particulars. Moreover, the jury imposing sentence in Petitioner's case based its determination of sentence upon weighing aggravating and mitigating circumstances, not eligibility for release. Under Oklahoma law the jury is precluded from being informed of parole considerations. See eg. Kovash v. State, 519 F.2d 517 (Okla. Crim. App. 1974), cert. denied 419 U.S. 830. See also Nguyen v. State, 769 P.2d 167, 173 (Okla. Crim. App. 1988) (rule applies to capital case). Similarly the factfinder who will resentence Petitioner (a jury should he request one) will evaluate the appropriateness of the death sentence through proper criteria.

Remanding Petitioner's case for resentencing does not constitute an arbitrary act, but rather a reasoned response to this Court's directive that his prior sentence was unconstitutionally imposed. As discussed, supra, remand of the cause for resentencing is not violative of ex post facto principles.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF MAILING

On this 29th day of November, 1989, a true and correct copy of the foregoing was mailed to:

Mandy Welch
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Susan Stewart Dickerson

SUSAN STEWART DICKERSON

SSD/vid/cartwrt.brf